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No. 15-1112

IN THE

Supreme Court of the United States

WELLS FARGO & CO. and WELLS FARGO BANK, N.A.,
Petitioners,

v.

CITY OF MIAMI, FLORIDA,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF OF RESPONDENT CITY OF MIAMI

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QUESTIONS PRESENTED

1. Whether the term "aggrieved person" in the Fair Housing Act imposes a zone-of-interest requirement more stringent than the case or controversy requirements of Article III, and whether the City falls within the zone of interests when the City alleges it was injured by discriminatory lending practices in violation of the FHA.

2. Whether widespread violations of the Fair Housing Act that directly and foreseeably harm the City's interests in fair housing and result in other economic harms to the City satisfy the Act's proximate cause requirements.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES v

BRIEF FOR RESPONDENTS 1

INTRODUCTION 1

STATEMENT OF THE CASE 3

A. Miami files a Complaint 3

B. The District Court dismisses the Complaint with prejudice 6

C. The Eleventh Circuit reverses. 7

D. Return to the District Court. 8

SUMMARY OF ARGUMENT 9

ARGUMENT 11

I. The City Falls Squarely Within the Zone of Interests Covered by the FHA. 11

A. The Zone of Interest test focuses on the scope of the statute and provides no barrier to standing when an arguable interest exists 11

B. Congressional intent, reflected by the FHA's text, legislative history,

and case law supports standing for Miami. 13

1. The conditions that brought the FHA into being, reflected in its text, support standing. 13

2. Jurisprudence under the FHA supports standing. 15

3. *The 1988 amendments to the FHA reinforce standing under the Act.* 22

C. *Thompson*'s reading of Title VII does not control construction of the FHA. 27

1. Thompson *did not impair* Trafficante's *interpretation of the FHA.* 28

2. Thompson's *approach to "aggrieved person" would not oust Miami from court.* 31

D. The proffered First Amended Complaint was far more than a sprinkling of conclusory statements unrelated to the City's injuries. 35

II. The City Has Sufficiently Pleaded Proximate Cause. 38

A. Miami adequately pleaded a causal chain that satisfies proximate cause. 40

B. Miami's allegations suffice to establish proximate cause, if proven. 49

C. The FHA has no directness requirement. 50

D. Even if FHA proximate cause imposes a directness requirement, Miami's complaint satisfied or could satisfy the requirement. 54

CONCLUSION 61

TABLE OF AUTHORITIES

Cases

Air Couriers Conference of America v. American Postal Workers Union, 498 U.S. 517 (1991) 13

Anza v. Ideal Steel Supply Corp., 547 U.S. 451 (2006) 53, 59

Ashcroft v. Iqbal, 556 U.S. 662 (2009) 52

Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970) 11

ATA Airlines, Inc. v. Federal Express Corp., 665 F.3d 882 (7th Cir. 2011) 40

Bald Eagle Area School District v. Keystone Financial, Inc., 189 F.3d 321 (3d Cir. 1999) 51

Baytree of Inverrary Realty Partners v. City of Lauderhill, 873 F.2d 1407 (11th Cir. 1989) 32, 34

Bazemore v. Friday, 478 U.S. 385 (1986) 52

Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) 42

Bennett v. Spear, 520 U.S. 154 (1997) 12, 25, 27

Block v. Community Nutrition Institute, 467 U.S. 340 (1984) 13

Blue Shield of Virginia V. McCready, 457 U.S. 465 (1982) 41, 43

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972) 21

Central Virginia Community College v. Katz, 546 U.S. 356 (2006) 30

City of Newport Beach v. Pacific Shores Properties, LLC, 135 S. Ct. 436 (2014) 49

Clarke v. Security Industry Association, 479 U.S. 388 (1987) 11, 12

County of Allegheny v. ACLU, 492 U.S. 573 (1989) 30

CSX Transportation, Inc. v. McBride, 564 U.S. 685 (2011) 43

Dura Pharmaceuticals, Inc. v. Broudo, 544 U.S. 336 (2005) 38

Exxon Co., U.S.A. v. Sofec, Inc., 517 U.S. 830 (1996) 41, 49

Forest Grove School District v. T.A., 557 U.S. 230 (2009) 26

Garcia v. Johanns, 444 F.3d 625 (D.C. Cir. 2006) 51

General Telephone Co. of the Northwest, Inc. v. EEOC, 446 U.S. 318 (1980) 37

Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979) ..... *passim*

Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) ..... *passim*

Hemi Group, LLC v. City of New York, New York, 559 U.S. 1 (2010) 41, 43, 60

Hilton v. South Carolina Public Railway Commission, 502 U.S. 197 (1991) 61

Holmes v. Securities Investor Protection Corp., 503 U.S. 258 (1992) 51, 52, 53

In re: Neurontin Marketing & Sales Practices Litigation, 712 F.3d 60 (1st Cir. 2013) 51

Jackson v. Birmingham Board of Education, 544 U.S. 167 (2005) 26

Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527 (1995) 41

John R. Sand & Gravel Co. v. United States, 552 U.S. 130 (2008) 30

Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) 15

Kimble v. Marvel Entertainment, LLC, 135 S. Ct. 2401 (2015) 23

Lexmark International, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377 (2014) ..... *passim*

Lorillard v. Pons, 434 U.S. 575 (1978) 26

Marr v. Rife, 503 F.2d 735 (6th Cir. 1974) 44

Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199 (2012) 11, 12

Meyer v. Holley, 537 U.S. 280 (2003) 40

Milwaukee & St. Paul Railway Co. v. Kellogg, 94 U.S. 469 (1876) 43

Nasser v. City of Homewood, 671 F.2d 432 (11th Cir. 1982) 6, 8, 32, 34

National Credit Union Administration v. First National Bank & Trust Co., 522 U.S. 479 (1998) 32

New West, L.P. v. City of Joliet, 491 F.3d 717 (7th Cir. 2007) 50

Pacific Shores Properties, LLC v. City of Newport Beach, 730 F.3d 1142 (9th Cir. 2013) 49, 59

Paroline v. United States, 134 S. Ct. 1710 (2014) 41, 43, 44

Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 30

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) 25, 30

Sheet Metal Workers v. EEOC, 478 U.S. 421 (1986) 30

Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) 44

Staub v. Proctor Hospital, 562 U.S. 411 (2011) 59

Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002) 38

Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507 (2015) ..... *passim*

Thompson v. North American Stainless, LP, 131 S. Ct. 863 (2011) ..... *passim*

Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205 (1972) ..... *passim*

Warth v. Seldin, 422 U.S. 490 (1975) 12, 21

Yates v. United States, 135 S. Ct. 1074 (2015) 28

Constitutional Provisions

U.S. Const. art. III ..... *passim*

Statutes

5 U.S.C. § 701 *et seq.* 13

7 U.S.C. § 601 *et seq.* 13

18 U.S.C. § 1961 *et seq.* 51

41 U.S.C. § 3602(i) 28

42 U.S.C. § 2000e-2(a) 28

42 U.S.C. § 2000e-2(m) 28

42 U.S.C. § 2000e-5(b) 28

42 U.S.C. § 2000e-5(f)(1) 28

42 U.S.C. § 3601 ..... 3, 10, 14

42 U.S.C. § 3601 *et seq.* 1, 14

42 U.S.C. § 3602(f) 13

42 U.S.C. § 3606 13

42 U.S.C. § 3610(a) 31

42 U.S.C. § 3610(g) 31

42 U.S.C. § 3612(a) 31

42 U.S.C. § 3612(o) 31

42 U.S.C. §§ 3612-14 16

42 U.S.C. ¶ 2000e-(f)(1) 27

45 U.S.C. § 51 *et seq.* 43

Civil Rights Act of 1968, § 810 (codified as amended at 42 U.S.C. § 3610 18

Civil Rights Act of 1968, § 812 (codified as amended at 42 U.S.C. § 3612 18

Pub. L. No. 100-430, 102 Stat. 1619 (Sept. 13, 1988) (codified as amended at 42 U.S.C. §§ 3601-3619) 22

Pub. L. No. 111-21, 123 Stat. 1617 (May 20, 2009) (codified as amended at 31 U.S.C. § 3729) 58

Other Authorities

114 Cong. Rec. 2274 (1968) 14

114 Cong. Rec. 2706 (1968) 16

114 Cong. Rec. 2987 (1968) 15

114 Cong. Rec. 2993 (1968) 14

134 Cong. Rec. S10454 (1988) 23

Apgar, W., M. Duda & R. Gorey, *The Municipal Costs of Foreclosures: A Chicago Case Study* (2005) 48

Brief of Petitioner, *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972), 1972 WL 136276 29

Brief of Respondent, *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972), 1972 WL 136277 29

City of Miami, Department of Community and Economic Development, *About Us* 56

Combating Problems of Vacant and Abandoned Properties (June 2006) 49

Financial Crisis Inquiry Report (Jan. 2011) 58

Greiner, D. James, *Causal Inference in Civil Rights Litigation*, 122 Harv. L. Rev. 533 (2008) 51

H.R. Rep. No. 100-711, 100th Cong., 2d Sess. 1988 (1988) 15, 23, 24

H.R. Rep. No. 96-865, 96th Cong., 2d Sess. 4 (1980) 24

Impact of the Mortgage Foreclosure Crisis on Vacant and Abandoned Properties in Cities—a 77 City Survey (June 2010) 49

Keeton, W. Page, *et al.*, *Prosser and Keeton on the Law of Torts* (5th ed. 1984) 44

Report of the National Advisory Commission on Civil Disorders (1968) 14

Ropiequet, John L., *A Curious Dichotomy: Fair Lending Litigation and Enforcement Actions Following Wal-Mart Stores, Inc. v. Dukes*, Banking & Fin. Services Pol'y Rep. (Jan. 2013) 31

Rubinfeld, Daniel L., "Reference Guide on Multiple Regression," in Federal Judicial Center, *Reference Manual on Scientific Evidence* (2d ed. 2000) 52

S. 867, 100th Cong. (1987) 26

U.S. Census Bureau, *State & County Quick Facts: Miami (city), FL* (2015) 54

Vacant and Abandoned Properties Survey and Best Practices (2008) 49

Wells Fargo Annual Report (2013) 47

Wells Fargo Annual Report (2014) 47

Wells Fargo Annual Report (2015) 45, 46, 47

Rules

Fed. R. Civ. P 12(b)(6) 49

BRIEF FOR RESPONDENTS

INTRODUCTION

Although the Fair Housing Act ("FHA"), 42 U.S.C. § 3601 *et seq.*, is nearly a half century old, discrimination and segregation in housing remain serious problems throughout the United States. *Tex. Dep't of Hous. and Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2515 (2015). As Congress recognized in enacting the FHA and as countless studies have shown since, discriminatory lending practices have contributed significantly to segregation and blight in American cities. This case presents the question of whether a city can sue to stop the discriminatory lending practices of banks. Because a city is injured in numerous ways by such discrimination, it should be deemed "aggrieved" within the meaning of the FHA and allowed to sue.

The suggestion that this unit of government is without the authority to pursue fair housing in the courts is not supported by the history and purpose of the FHA or this Court's jurisprudence. The state of America's cities and the economic and social challenges they faced from a volatile racial divide impelled Congress to enact the FHA in the first place. To address that urban crisis, Congress authorized a wide range of potential plaintiffs, public and private, to vindicate the anti-discrimination principles advanced by the FHA and later expanded that reach in 1988.

It is particularly important that cities be part of the solution, as urban centers are where the impact

of systemic housing discrimination is most acutely felt. Cities across the country are engaged in combatting discrimination, resolving complaints, and remediating neighborhoods. When housing discrimination occurs on a widespread basis within a city, it diminishes tax revenues while demanding disproportionate city resources, diverting law enforcement, fire department, and building and safety efforts, and endangering the entire community.

Permitting cities to vindicate their important rights under the FHA will not expand the scope of parties eligible to pursue such claims to include dry cleaners, bowling alleys, and hardware stores. Rather, the simple retort is that only parties with an interest in fair housing, such as the City of Miami, have standing to vindicate their rights. Clearly, a bowling alley is not similarly situated to a municipality, and the relief sought by Miami will not result in an expansion of liability under the FHA beyond the bounds authorized by Congress.

Since *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 98 (1979), upheld municipal standing to pursue claims like Miami's, cities have taken wrongdoers to court, though infrequently. When it amended the FHA in 1988, Congress did not merely acquiesce in *Gladstone*'s holding that FHA standing is as broad as Article III permits, but explicitly endorsed it. In the all too few instances where cities or counties have exercised that authority, sometimes with Justice Department assistance, progress was made in the battle against housing discrimination. Few municipalities will have the wherewithal, endurance, and political willpower to

undertake the arduous task of a lawsuit against one of its most prominent corporate citizens.

In the end, Miami's lawsuit against the Banks fits squarely within the FHA's purpose of providing "for fair housing throughout the United States," 42 U.S.C. § 3601. In a case like this one, involving allegations of intentional discrimination, significant evidence of disparate impact, and injunctive and declaratory relief, the FHA would be robbed of its force if the unit of government most closely and directly affected is denied standing to bring an action. The lower court's decision should be affirmed.

STATEMENT OF THE CASE

A. Miami files a Complaint.

On December 13, 2013, Plaintiff-Respondent City of Miami ("City") filed a detailed, 63-page Complaint (*see* J.A. 266-349), against Wells Fargo & Co. and Wells Fargo Bank, N.A. (collectively, "Bank"), alleging that it had violated the FHA by engaging in discriminatory mortgage lending practices that resulted in a disproportionate and excessive number of defaults by minority homebuyers and resulting in significant, direct, and continuing financial harm to the City. The discriminatory lending practices disproportionately "plac[ed] vulnerable, underserved [minority] borrowers in loans they cannot afford." Then, as the City alleged, "when a minority borrower who previously received a predatory loan sought to refinance the loan, . . . [the Banks] refused to extend credit at all, or on terms equal to those offered when refinancing similar loans issued to white borrowers." *Id.* at 269-71, 354-56.

As the Eleventh Circuit correctly characterized the allegations, the City alleged "the bank targeted black and Latino customers in Miami for predatory loans that carried more risk, steeper fees, and higher costs than those offered to identically situated white customers, and created internal incentive structures that encouraged employees to provide these types of loans." Pet. App. 21a.

The Complaint further alleged that a regression analysis of available data demonstrated that African-American borrowers were 4.321 times more likely to receive a discriminatory loan than a white borrower with similar underwriting and borrower characteristics. Latino borrowers were 1.576 times more likely to receive such loans. Even an African-American borrower with a FICO score greater than 660 was 2.572 times more likely to receive a discriminatory loan than a white borrower with similar underwriting and borrower characteristics, and a Latino borrower with an above-660 score was 1.875 times more likely to receive such loans. J.A. 323-24. These results are consistent with the allegations that 11.1% of loans made to Miami's minority borrowers were high-cost, whereas only 3.2% of loans to white borrowers were high-cost. *Id.* at 319-20, 405-06.

The Complaint also alleged facts that these loan practices foreseeably resulted in foreclosures, did so more rapidly for minority borrowers than whites, and that the foreclosures were caused by the discriminatorily unfavorable loan terms. For example, a discriminatory loan in Miami was 5.494 times more likely to result in foreclosure than a non-

discriminatory loan. *Id.* at 333. Additionally, a discriminatory loan to an African-American borrower in Miami was 13.324 times more likely to result in foreclosure than a non-discriminatory loan to a white borrower with similar risk characteristics, and a discriminatory loan to a Latino borrower was 17.341 times more likely to result in foreclosure than a loan in a predominantly non-discriminatory loan to a white borrower with similar risk characteristics. *Id.* Moreover, the Complaint alleged that a loan made to a borrower residing in a predominantly minority neighborhood in Miami was 6.975 times more likely to result in foreclosure than a loan in a non-minority neighborhood. *Id.* at 272.

As a result of these practices, the Complaint alleged that property values of the homes vacated and of other homes in the same neighborhoods as newly vacated homes diminished and caused a loss of tax revenues to the City. *Id.* at 345. Moreover, the Complaint alleged that a Hedonic regression analysis could calculate the City's loss attributable to the Bank's discriminatory lending practices and separate out other potential causes. *Id.* at 336-38. In addition, the City suffered other economic damages beyond lost tax revenues because it has had to expend additional monies on municipal services to address problems of vagrancy, criminal activity, and threats to the public health and safety arising at these properties because of their foreclosed status, as well as to remediate newly blighted neighborhoods. *Id.* at 338-41. To make concrete any generalized allegations, the City preliminarily identified 999 discriminatory loans issued by the Bank between 2004-2012 that resulted in foreclosure and, in the Complaint, provided sample

addresses to ten homes. *Id.* at 341-42. In addition to monetary damages, Miami further sought injunctive and declaratory relief. *Id.* at 347.

B. The District Court dismisses the Complaint with prejudice.

On July 9, 2014, the District Court granted the Bank's motion to dismiss with prejudice with respect to the allegations based on the FHA, while dismissing a second cause of action premised on unjust enrichment without prejudice. Pet. App. 81a-99a. The District Court concluded that Miami lacked standing based upon its reading of *Nasser v. City of Homewood*, 671 F.2d 432 (11th Cir. 1982). Pet. App. 90a-93a. The District Court further concluded that "proximate causation for standing" was not adequately alleged because Miami failed to isolate the Bank's practices as the sole cause of the City's injuries. *Id.* at 93a-94a. Finally, the District Court concluded that Miami's claims were time-barred, but acknowledged that an amendment could cure the court's concerns. *Id.* at 95a-96a.

On July 21, 2014, the City timely moved for reconsideration, proffering a proposed First Amended Complaint (J.A. 350-434) to make more explicit a number of allegations merely implicit in the original Complaint, particularly focusing upon Miami's interest in fair housing and an integrated society. J.A. 351, 362-63, 416-17. The proposed Complaint further provided additional details deemed lacking by the Court with respect to its unjust enrichment claim. *Id.* at 429-30.

On September 9, 2014, the District Court denied the motion for reconsideration, holding that Plaintiff's arguments were "ones that the Plaintiff already made or that it could have, but chose not to" and do not "cause the Court to reconsider its prior Order." Pet. App. 78a. The Court did offer Miami additional time to file a new complaint based on the claim for unjust enrichment alone. *Id.* at 80a. The City, choosing not to split its causes of action, instead filed a notice of appeal on October 7, 2014.

C. The Eleventh Circuit reverses.

The Eleventh Circuit reversed the District Court in a unanimous opinion. First, it held "the phrase 'aggrieved person' in the FHA extends as broadly as is constitutionally permissible under Article III," relying on this Court's identical holdings in *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 209 (1972), *Gladstone*, 441 U.S. at 98, and *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982). Pet. App. 45a. It recognized that the more recent Title VII decision in *Thompson v. North American Stainless, LP*, 131 S. Ct. 863 (2011), "gestured in the direction of rejecting that interpretation, [but] a gesture is not enough." *Id.* It noted that "*Thompson* itself was a Title VII case, not a Fair Housing Act case," and that *Thompson* only stated "that any suggestion drawn from the FHA cases that Title VII's cause of action is similarly broad was 'ill-considered' dictum." Pet. App. 45a (citing *Thompson*, 562 U.S. at 176).

The Eleventh Circuit rejected the District Court's application of its decision in *Nasser*, 671 F.2d

432, where the plaintiff alleged no FHA violation. Instead, it held that "the City claims to have suffered an economic injury resulting from a racially discriminatory housing policy," which was sufficient to state a claim under the FHA. Pet. App. 47a. It concluded that the zone of interest analysis applicable to the FHA "encompasses the City's allegations in this case." *Id.*

It further held that the City's allegations were sufficient to meet the FHA's proximate cause requirement, stating that the Complaint alleged "the Bank's discriminatory lending caused property owned by minorities to enter premature foreclosure, costing the City tax revenue and municipal expenditures." *Id.* at 56a. It added, "[a]lthough there are several links in that causal chain, none are unforeseeable." *Id.* The court further noted that the complaint "alleges that the Bank had access to analytical tools as well as published reports drawing the link between predatory lending practices 'and their attendant harm,' such as premature foreclosure and the resulting costs to the City, including, most notably, a reduction in property tax revenues." *Id.* at 55a. It rejected the District Court's requirement that proximate cause be isolated, as though it were the sole cause. *Id.* at 55a-58a. As to the other issues raised by the Bank or the District Court's opinion, the Eleventh Circuit remanded the case to allow the City to file an amended complaint.

D. Return to the District Court.

Upon remand, the City filed a Second Amended Complaint (ECF No. 61), which the District Court dismissed without prejudice on March 17, 2016 on

statute of limitations grounds. ECF No. 77. The City filed a Third Amended Complaint on April 29, 2016. ECF No. 80. The Bank filed a motion to dismiss that pleading on May 24, 2016 (ECF No. 102), but proceedings were stayed pending this Court's decision. ECF No. 103.

SUMMARY OF ARGUMENT

The City of Miami filed intentional and disparate impact claims that Wells Fargo issued undesirable mortgages to African-American and Latino borrowers. The Bank knew that the loans were likely to end in default. If that occurred, it was easily foreseeable that the City would be harmed.

The Bank asks this Court to reverse the Eleventh Circuit's well-reasoned decision and dismiss these claims, arguing that the City lacks an interest in non-discrimination or fair housing and that its injuries are unconnected to those harms. However, a fair reading of the City's Complaint makes plain that the City has a strong and inherent interest in the benefits of an integrated community and was harmed in its fair housing efforts, while suffering further injuries in the form of lowered property tax revenues and remediation costs. The City's claims and alleged injuries are similar to those sustained in 1979 in *Gladstone*.

The FHA was enacted to eradicate housing discrimination with a special emphasis on the problems discrimination causes for cities. When the Act was amended in 1988, Congress strengthened the Act to assure greater enforcement efforts through litigation, both public and private. In doing so,

Congress explicitly endorsed the "broad holdings" of this Court's jurisprudence, which established that FHA standing reached as far as Article III permits. This broad reach is consistent with the FHA's purpose "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. No other civil rights law embraces that reach.

Recent jurisprudence concerning other civil rights statutes do not support narrowing the scope of FHA standing and explicitly approve the approach and implicitly approve the result in *Gladstone*, which upheld municipal standing for claims and asserted injuries similar to Miami's. Moreover, the strong congressional intent to support direct and indirect claims under the FHA validates Miami's cause of action.

Miami also meets the proximate cause requirements inherent in an FHA action. It was directly harmed in its fair housing efforts by the Bank's issuance of discriminatory loans, much as the non-profit organization afforded standing in *Havens*. A plaintiff must only demonstrate proximate cause substantial enough and close enough to the harm to effectuate the law's purposes. That benchmark was met by Miami's pleadings. Using regression analysis of the discriminatory loans identified, Miami alleged it was able to separate out the effect of other potential causes so that its claims were limited to discriminatory loans and the harms they caused. Moreover, the sophisticated analytical tools used by banks reveal which loans will likely enter foreclosure even before they are issued, and countless studies demonstrate foreclosures' impact on cities.

It would be a remarkable concept to enjoin cities from enforcing one of the nation's most important anti-discrimination statutes when the effects of housing discrimination are most acutely experienced in the Nation's urban centers. Here, the City's interest and the harms visited upon it by discrimination provide the requisite standing. Miami should have its day in court, because its claims fit squarely within the law's zone of interests and causal requirements.

ARGUMENT

I. The City Falls Squarely Within the Zone of Interests Covered by the FHA.

A. The Zone of Interest test focuses on the scope of the statute and provides no barrier to standing when an arguable interest exists.

To be within the zone of interests protected or regulated by a statute, a plaintiff must assert an interest recognized by the underlying statute. *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970). The cognizable interests can be as diverse as "'aesthetic, conservational, and recreational'" as well as "economic values." *Id.* at 153-54. This Court has never retreated from this broadly inclusive approach. The zone-of-interest test "is not meant to be especially demanding." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012) (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987)). In fact, this Court has noted "we have always conspicuously included the word 'arguably' in the test to indicate

that the benefit of any doubt goes to the plaintiff." *Id.* Thus, the "test forecloses suit only when a plaintiff's 'interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'" *Id.* (quoting *Clarke*, 479 U.S. at 399).

To make the "zone" determination, a court applies Congress's "evident intent" and emphatically does "not require any 'indication of congressional purpose to benefit the would-be plaintiff.'" *Id.* (quoting *Clarke*, 479 U.S. at 399-400). Congress may make the relevant zone of interests as broad or as narrow as it chooses, as long as it confers standing in accordance with Article III's "case or controversy" requirement. *Warth v. Seldin*, 422 U.S. 490, 501 (1975). *See also Bennett v. Spear*, 520 U.S. 154, 164-65 (1997) (authorizing standing under the Endangered Species Act to all who allege an interest in the animals' preservation).[1] The test is statute-specific and uses "traditional tools of statutory interpretation [to determine] whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1389, 1387 (2014).[2]

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[1] Justice Scalia's opinion for the Court in *Bennett* "follow[ed] *a fortiori* from our decision in *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 93 S.Ct. 364, 34 L.Ed.2d 415 (1972), which held that standing [under the FHA] was expanded to the full extent permitted under Article III." 520 U.S. at 165.

[2] Because the zone test is referred to as "statutory standing," *Lexmark*, 134 S. Ct. at 1388 n.4, the Bank's invocation of *Air Couriers Conference of America v. American Postal Workers*

B. Congressional intent, reflected by the FHA's text, legislative history, and case law supports standing for Miami.

1. The conditions that brought the FHA into being, reflected in its text, support standing.

To "address[] the denial of housing opportunities," the FHA prohibits "[d]iscriminatory housing practices," including discrimination in the sales, rentals, and real estate transactions. 42 U.S.C. §§ 3602(f), 3606. Congress expressed the law's unique and enormous breadth in its very first section, declaring its purpose: "to provide, within constitutional limitations, for fair housing throughout

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Union, 498 U.S. 517 (1991) and *Block v. Community Nutrition Institute*, 467 U.S. 340 (1984), *see* WF Br. 30-31, is unavailing. While both cases involved challenges to agency action under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*, the standing inquiry in APA cases is informed by the statute that granted the agency authority to promulgate the rules. Neither authority-granting statute used the adversely affected standard in the FHA, even though the APA does. For example, in *Block*, this Court reviewed the Agricultural Adjustment Act, 7 U.S.C. § 601 *et seq.*, and denied standing because Congress intended to limit eligible plaintiffs to those entitled "to participate in the development of market orders" and because consumer lawsuits "would severely disrupt this complex and delicate administrative scheme." 467 U.S. at 346, 348. Similarly, in *Air Couriers*, the zone-of-interest inquiry focused on the Private Express Statutes, which give the U.S. Postal Service a monopoly over letter carrying. 498 U.S. at 519. Neither statute is comparable to the FHA, which encourages both public and private lawsuits to vindicate its purpose, and neither precedent provides helpful guidance.

the United States." 42 U.S.C. § 3601. No other civil rights law embraces that reach.

Congress enacted the FHA, 42 U.S.C. § 3601 *et seq.*, in response to an urban crisis in which segregated and deteriorating inner cities were centers of unrest, crime, and turmoil. Residential segregation and unequal housing and economic conditions in the inner cities produced the social unrest afflicting the Nation's cities, according to the federal commission established to investigate the conditions. *Inclusive Cmtys.*, 135 S. Ct. at 2516 (citing *Report of the Nat'l Advisory Comm'n on Civil Disorders* 91 (1968) ("Kerner Comm'n Report")). Urban riots, following the assassination of Dr. Martin Luther King, Jr., provided the backdrop to the FHA's enactment. *Id.*

The FHA's legislative history reflects Congress's intention to broaden the Act's scope beyond individual enforcement by individual victims of discrimination. One of the principal sponsors of the Act, Senator Mondale, put the proposed legislation into the context the Kerner Commission described. Confronting "fantastic pressures," the nation's cities suffered from a "[d]eclining tax base, poor sanitation, loss of jobs, inadequate educational opportunity and urban squalor" for which "[f]air housing legislation is a basic keystone to any solution of our present urban crisis." 114 Cong. Rec. 2274 (1968). Senator Mondale understood that tolerance of continued housing discrimination would lead to the "destruction of our urban centers by loss of jobs and business to the suburbs, a declining tax base, and the ruin brought on by absentee ownership of property." 114 Cong. Rec. 2993 (1968) (statement of Sen. Mondale). His

principal co-sponsor, Senator Brooke, called unequal housing an "economic problem affecting all the urban centers of America" and one that will render "cities . . . less and less able to cope with their problems, financially and in every other way." 114 Cong. Rec. 2987, 2988 (1968) (statement of Sen. Brooke). Plainly, the FHA's sponsors were focused on the impact of unequal housing on cities and its ripple effects on municipal finances and services.

2. Jurisprudence under the FHA supports standing.

In case after case, this Court has broadly interpreted who has standing to sue under the FHA. The FHA is "a comprehensive open housing law." *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968). Unlike other civil rights statutes, the FHA's "'potential for effectiveness . . is much greater . . . because of the sanctions and the remedies that it provides.'" *Id.* at 415 n.19. To achieve its capacious purpose of providing for fair housing throughout the nation to the extent that the Constitution permits and to honor its "broad and inclusive" language, this Court decreed that the FHA must be given "generous construction" in order to carry out a "policy that Congress considered to be of the highest priority." *Trafficante*, 409 U.S. at 211-12. Recently, referencing the statute's first provision, this Court declared that the FHA's "central purpose" is to "eradicate discriminatory practices within a sector of our Nation's economy." *Inclusive Cmtys.*, 135 S. Ct. at 2521. *See also* H.R. Rep. No. 100-711, at 15, 100th Cong., 2d Sess. 1988 (1988) (hereinafter "H.R. Report") (FHA "provides a clear national policy

against discrimination in housing"). Consistent with that breadth and goal, the FHA provides for both private and governmental rights of action. *See* 42 U.S.C. §§ 3612-14.

This Court's broad interpretation of the FHA's standing requirements began with *Trafficante*. In that case, this Court found that standing was available to two tenants who asserted an injury from the impairment of the social benefits of integration, business and professional opportunities, and other advantages because an apartment building owner had discriminated against prospective tenants other than themselves. *Trafficante*, 409 U.S. at 206-08. Cities share the same interests asserted by the tenants.

Trafficante rejected the argument that the FHA's zone of interests limited lawsuits to "persons who are the objects of discriminatory housing practices." *Id.* at 208. Instead, it held that Congress intended standing under the Act to be as broad as is permitted by Article III of the Constitution. *Id.* at 209. It noted that "proponents of the legislation emphasized that those who were not the direct objects of discrimination had an interest in ensuring fair housing, as they too suffered," an interpretation consistent with that of the Department of Housing and Urban Development ("HUD"). *Id.* at 210 (footnote citation omitted). The Court also cited the observation of Senator Javits that housing discrimination harms not only the "'victim of discriminatory housing practices,'" but "'the whole community.'" *Id.* at 211 (citing 114 Cong. Rec. 2706 (1968)). Moreover, the Court accepted the representations of the United States that FHA enforcement is dependent on private

attorneys general, as the government had limited resources to undertake such actions, even when authorized, *id.* at 211, thereby placing enormous importance on the availability of private litigation by third parties.

The Bank argues that *Trafficante*'s broad holding on the requirements for FHA standing is permissible because it was limited to the context of residents of an apartment complex, relying on qualifying language that this Court used. WF Br. 20. *See Trafficante*, 409 U.S. at 209 ("insofar as tenants of the same housing unit that is charged with discrimination are concerned"). While that language reflected this Court's solicitude of the injury that arises from discrimination that injures others by depriving them of the benefits of interracial association, it is best understood to mean that another person in that neighborhood, who was not a tenant in that building complex, could not make the same claim based on the same refusal to rent to a third party. The level of discrimination, in other words, could not radiate out further than the apartment complex at issue because of the nature of the discriminatory act.

Trafficante's qualifying language did not deter this Court from recognizing that wider FHA violations could create harms affecting a greater geographic area. In *Gladstone*, 441 U.S. 91, the Court made clear that the Article III basis for standing was not limited to tenants of a large apartment complex, but could also encompass a 12-by-13 block residential neighborhood. *Id.* at 113. The relevant geographic area, the Court held, was not controlling because of the scope of the violation. *Id. Gladstone* thus rejects

the Bank's suggested limitation on *Trafficante*'s holding.

While Trafficante sued on the basis of then § 810, in *Gladstone*, the Village of Bellwood went to court for violations of the FHA by a realty firm under § 812.[3] In *Gladstone*, 441 U.S. 91, Bellwood's barebones complaint alleged it had

> "been injured by having [its] housing market . . wrongfully and illegally manipulated to the economic and social detriment of the citizens of [the] village," and that the individual respondents "have been denied their right to select housing without regard to race and have been deprived of the social and professional benefits of living in an integrated society."

Id. at 95 (ellipses in original).

This Court, examining legislative history, rejected the argument that differences between the two provisions authorizing lawsuits, § 810 (available to a "person aggrieved") and § 812 (without a plaintiff definition) foreclosed lawsuits by indirect victims of discrimination. Instead, it held "that §§ 810 and 812 are available to precisely the same class of plaintiffs." *Id.* at 105. Turning to Bellwood's complaint, the Court recognized that a "significant reduction in property values directly injures a municipality by diminishing

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[3] Section 812 lacked limitations on plaintiffs, as long as they sought to enforce the FHA. *Gladstone*, 441 U.S. at 101.

its tax base, thus threatening its ability to bear the costs of local government and to provide services," as well as "rob[s] Bellwood of its racial balance and stability, the village has standing to challenge the legality of that conduct." *Id.* at 110-11.

Adhering to the holding in *Trafficante* that the FHA's "within constitutional limitations" mandate conferred standing as broadly as Article III permits, *see* 409 U.S. at 209, *Gladstone* held that a municipality has standing to pursue injuries to its tax base and the resulting effect on its budget, due to discriminatory housing practices. Significantly, this Court declared:

> As long as the plaintiff suffers actual injury as a result of the defendant's conduct, he is permitted to prove that the rights of another were infringed. The central issue at this stage of the proceedings is not who possesses the legal rights protected by § 804, but whether respondents were genuinely injured by conduct that violates someone's § 804 rights, and thus are entitled to seek redress of that harm under § 812.

Id. at 103.

Notably, this Court recently endorsed the standing analysis employed in *Gladstone* as wholly compatible with the zone-of-interest test. *Thompson*, 131 S. Ct. at 869. Thus, Miami's claim, indistinguishable from Bellwood's, also meets this Court's recent articulation of the applicable standard,

whether that standard is Article III standing or something more constrained. *Thompson*'s approval of Bellwood's standing, may "all but decide[] this case," as the Bank contends, WF Br. 12, but, if it does, it decides the issue in favor of Miami. The City submits that its original Complaint fairly establishes that the City's Bellwood-like injuries resulted from the Bank's racially imbalanced mortgage practices. The FHA was intended to address the very combination of interests and injuries Miami has suffered.[4]

Havens reaffirmed the Article III reach of FHA standing and afforded standing to a non-profit organization that operated a "housing counseling service, and . . . investigat[ed] and referr[ed] complaints concerning housing discrimination." 455 U.S. at 372, 368. The organizational plaintiff claimed that the discriminatory steering practices "had frustrated the organization's counseling and referral services, with a consequent drain on resources," and deprived its members "of the benefits of interracial association." *Id.* at 369.

Havens stated that *Gladstone* "*held* that 'Congress intended standing under § 812 to extend to the full limits of Art. III' and that the courts accordingly lack the authority to create prudential barriers to standing in suits brought under [§ 812]." *Id.* at 372 (emphasis added) (citing *Gladstone*, 441 U.S. at 103 n.9). *See also id.* at 375-76. *Havens* then emphatically agreed: "the sole requirement for

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[4] If Miami's Complaint somehow insufficiently alleges those interests and injuries, the solution, as in *Havens*, is a remand that would "afford the plaintiffs an opportunity to make more definite the allegations of the complaint." 455 U.S. at 378.

standing to sue under § 812 is the Art. III minima of injury in fact." *Id.* at 372.

Whether the source of the injury is direct or indirect, such as claims of injury based on "an adverse impact on [a] neighborhood" resulting from discriminatory housing practices, is "of little significance in deciding whether a plaintiff has standing to sue under § 812 of the Fair Housing Act." *Id.* at 375. As a result, *Havens* held that the impairment of the organization's ability to provide counseling and referral services and the "consequent drain on the organization's resources" constituted a "concrete and demonstrable injury" sufficient to confer standing. Miami's injuries are indistinguishable.

The Bank asserts that Miami lacks an "injury to [its] interest in non-discrimination. WF Br. 28. It denies Miami has the requisite noneconomic interest in encouraging open housing and claims its injuries "do[] *not* depend on the discriminatory nature of the challenged conduct." WF Br. 32 (emphasis in original). Yet, a fair reading of the City's Complaint and, even more so, a fair reading of the City's proffered First Amended Complaint shows that Miami's injuries are no less concrete and demonstrable and unquestionably tied to the discriminatory misconduct. After all, courts "must construe the complaint in favor of the complaining party," *Warth*, 422 U.S. at 501, and "take the allegations of the complaint at face value," *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 515 (1972).

The discriminatory mortgage lending practices at issue here, giving more expensive and riskier loans to minority borrowers than non-minority borrowers, directly harm the City's fair housing efforts and deprive it of the benefits of an integrated community by blighting neighborhoods and discouraging an influx of diverse residents. It also robs properties and neighborhoods of their value, diminishes tax revenues, and requires extra police, fire, and safety attention, draining the City's resources. The FHA was intended to end that cycle of urban blight, and Miami's lawsuit plainly furthers those interests.

If these harms and their close connection to the alleged discriminatory conduct were not apparent from the whole of the original Complaint and its detailed factual allegations in the original Complaint, it was made more explicit in the proffered First Amended Complaint, J.A. 350-434. If the City were afforded the opportunity for discovery, the City could fine tune its claims even more.

3. *The 1988 amendments to the FHA reinforce standing under the Act.*

The Bank treats the legislative history of the 1988 FHA amendments, Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (Sept. 13, 1988) (codified as amended at 42 U.S.C. §§ 3601-3619), as limited to ratifying *holdings* in *Trafficante*, *Gladstone*, and *Havens*, and argues that the decisions' declarations on the scope of the FHA's zone of interests constitutes mere *dicta*. *See* WF Br. 24-27. If the cases' uniform declarations that standing under the FHA reaches as far as Article III permits

constitute holdings, rather than *dicta*, the Bank asks this Court to overrule them. WF. Br. 24 n.6. Of course, "*stare decisis* carries enhanced force when a decision . . . interprets a statute," because "critics of our ruling can take their objections across the street, and Congress can correct any mistake it sees." *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015). Even so, the City submits that the cases hold that FHA standing embraces the full authority of Article III and accurately reflect congressional intent.

The primary motivation for the 1988 amendments was a bipartisan consensus that stronger enforcement was needed, including through litigation. As the amendments' sponsor, Senator Kennedy, explained upon introduction of the final bill, the FHA was a "toothless tiger" that "proved to be an empty promise because the legislation lacked an effective enforcement mechanism." 134 Cong. Rec. S10454 (1988) (statement of Sen. Kennedy). That criticism is reflected as well in the House Report. H.R. Report 13 (FHA "fails to provide an effective enforcement system to make [its] promise a reality"). The report added that the FHA's limited means for enforcing the law" constitutes "the primary weakness in existing law." *Id.* Even while creating an administrative enforcement system, the amendments were intended "to remov[e] barriers to the use of court enforcement by private litigants and the Department of Justice." *Id.*

The new amendments recognized that "private enforcement has achieved some success," but also acknowledged that enforcement was "restricted by the limited financial resources of litigants and the bar,

and by disincentives in the law itself." *Id.* at 15. To encourage more private litigation, Congress "strengthen[ed] the private enforcement section by expanding the statute of limitations, removing the limitation on punitive damages [thereby boosting the private attorney general status of private litigants], and bringing attorney's fees language in title VIII closer to the model used in other civil rights laws [so that it was no longer limited to those who could not afford counsel]." *Id.* at 16.

The amendments also authorized the "Attorney General to intervene in private cases of general public importance" and "seek substantial civil monetary penalties against violators."[5] *Id.*

When it turned to the definition of "aggrieved person," which the amendments made applicable to all private litigation, Congress acknowledged this Court's decisions in *Gladstone* and *Havens* and the holding that both avenues of litigation for private litigation were identical. H.R. Report 17. It stated that the "bill adopts as its definition language similar to that contained in Section 810 of existing law, as modified *to reaffirm the broad holdings of these cases.*" *Id.* at 17 (emphasis added).

Wells Fargo argues that the words "broad holdings" essentially restrict Congress's endorsement

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[5] Congress had long been disappointed with the level of Justice Department pursuit of fair housing violations. Between the passage of the FHA in 1968 and 1980, the Justice Department brought only about 300 lawsuits. *See* Fair Housing Amendments Act of 1980, H.R. Rep. No. 96-865, 96th Cong., 2d Sess. 4 (1980).

to the results of those cases and not to their treatment of "aggrieved person." WF Br. 24-26. However, "[w]hen an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound." *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 67 (1996).

Yet, if there was any broad holding that Congress embraced in these cases, it had to be the breadth of standing accorded private plaintiffs. Congress could not look at *Gladstone* and fail to understand that municipalities had standing to pursue lost tax revenues and other expenses that flowed from the consequences of discriminatory housing practices. That understanding reflects the result *and the holding* in the case.

Motivated as it was to expand enforcement of the FHA through litigation, Congress could not look at *Havens* and fail to understand that organizations involved in promoting fair housing had standing to pursue lost resources that flowed from the consequences of discriminatory housing practices. That understanding, too, reflects the result and the holding in the case. In addition, it makes no sense that Congress would have read these cases, which characterize the relevant jurisprudence as *holding* that Congress intended standing to reach as far as Article III permits, *see Havens*, 455 U.S. at 372,[6] and treat that characterization as erroneous. Indeed, if

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[6] In fact, this Court has characterized the *Trafficante* statement that standing reaches as far as Article III permits as a holding in an opinion written by the author of *Thompson*. *See Bennett*, 520 U.S. at 165 (Scalia, J.).

anything in those opinions was likely to jump out at the Congress and cry for correction if erroneous, it would have been the description of FHA standing being coextensive with Article III.

Moreover, Senator Hatch offered but Congress did not adopt a narrowed definition of "aggrieved person" that would have made the law closer to what the Bank now asks of the Court. The Senator's bill would have defined "aggrieved person" as a person whose bona fide attempt to buy, sell, lease, or finance a dwelling has been denied on a discriminatory basis, thereby limiting plaintiffs to those who were the direct victims of discrimination. Equal Access to Housing Act of 1987, S. 867, 100th Cong. (1987). The failure of that bill further confirms that Congress did not impair the approach to standing that this Court utilized in *Trafficante*, *Gladstone*, and *Havens*, even though the issue was plainly raised in that body.

This Court has held that "[w]hen Congress amend[s an Act] without altering the text of [the relevant provision], it implicitly adopt[s this Court's] construction" of that provision. *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 244 n.11 (2009). *See also Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 176 (2005) (finding it "not only appropriate but also realistic to presume that Congress was thoroughly familiar with [earlier relevant precedent] and . . expected its enactment . to be interpreted in conformity with it.") (internal quotation marks and alterations omitted); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (noting that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute

and to adopt that interpretation when it re-enacts a statute without change").

In *Inclusive Communities*, this Court found Congress' decision to amend the FHA in 1988 against the backdrop of existing precedent was "convincing support that Congress accepted and ratified" these holdings. 135 S. Ct. at 2520. Here, Congress explicitly reaffirmed this Court's prior treatment of aggrieved person in *Gladstone* and *Havens* when approving the 1988 Amendments. The uniformity of treatment in this Court's decisions on FHA standing made it settled law.

C. *Thompson*'s reading of Title VII does not control construction of the FHA.

The Bank contends that *Thompson* "all but decides this case." WF Br. 12. It does so largely on a *presumption* that the use of "aggrieved" in Title VII, as defined in *Thompson*, 562 U.S. 170, equally applies to the term's use in the FHA. Even so, when the Bank seeks to avoid the broad description of standing under the FHA contained in *Bennett*, 520 U.S. at 165, it tells this Court *Bennett* "was a case about the [Endangered Species Act], not the FHA, so whatever that opinion said about the FHA was merely dictum." WF Br. 23. If that later statement is correct, then because *Thompson* was about Title VII, not the FHA, whatever it said about the FHA was also merely dictum.

Title VII's authorizes "a person claiming to be aggrieved" by discriminatory employment actions to file charges with the Equal Employment Opportunity Commission ("EEOC") for conciliation purposes and

then federal court if the EEOC declines to sue the employer. 42 U.S.C. § 2000e-5(b), (f)(1).

Thompson's definition of "aggrieved person" for Title VII does not control interpretation of similar language in the FHA. Though both are civil rights statutes, Title VII differs from the FHA in a number of significant ways. For example, Title VII does not have purpose language like that of the FHA, indicating Congress's intent to prohibit the subject discrimination "within constitutional limitations." For another, while Title VII hinges heavily on the motive behind an adverse employment decision, *see* 42 U.S.C. §§ 2000e-2(a), (m), the FHA focuses on results. *Inclusive Cmtys.*, 135 S. Ct. at 2118-19, 2525. Perhaps most importantly, the FHA specifically defines "aggrieved person," 41 U.S.C. § 3602(i), whereas Title VII does not.

Moreover, this Court has made clear that "[w]e have several times affirmed that identical language may convey varying content when used in different statutes, sometimes even in different provisions of the same statute." *Yates v. United States*, 135 S. Ct. 1074, 1082 (2015) (providing examples). Here, precedent and legislative history support reading aggrieved person more broadly in the FHA than Title VII.

1. Thompson *did not impair* Trafficante's *interpretation of the FHA.*

To the Bank, *Thompson*'s characterization of the treatment of "aggrieved person" in *Trafficante* as "ill-considered dictum," 562 U.S. at 176, undermines any reliance upon the decision. WF Br. 13, 23. In doing

so, the Bank misreads *Thompson*, which made clear that *Trafficante*'s take on the standing requirements of Title VII constituted dictum, not its holding on the standing requirements of the FHA. *Thompson* emphasized that "it is Title VII rather than Title VIII that is before us here, and as to that we are surely not bound by the *Trafficante* dictum." 562 U.S. at 176. What was the *Trafficante* dictum? It was "dictum that the *Title VII aggrievement requirement* conferred a right to sue on all who satisfied Article III standing." *Id.* (emphasis added). In other words, the *dictum* was what *Trafficante* said about Title VII, not what it said about the FHA.

What *Trafficante* said about standing under the FHA, on the other hand, was squarely before the Court and fully ventilated. *Trafficante* called upon this Court to determine the scope of standing under the FHA, with the parties arguing about whether "aggrieved" meant any person who satisfies Article III standing, *see* Br. of Pet'r, *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205 (1972), 1972 WL 136276, at 16 & n.10, or whether "aggrieved" meant only those directly injured by the claimed violation. Br. of Resp't, *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205 (1972), 1972 WL 136277, at 37-39. As the Bank concedes, *Trafficante*'s decision on that issue was a holding "insofar as tenants of the same housing unit that is charged with discrimination are concerned." WF Br. 20 (quoting 409 U.S. at 209). Subsequent decisions of this Court patently established that the holding was not a ticket only available on that particular train. *See Gladstone*, 441 U.S. at 113.

Even if the reference to Article III could be treated as *dicta*, the statements about law decided by this Court that have been briefed and put in issue by the parties are entitled to precedential value. *Cf. Cent. Va. Cmty. College v. Katz*, 546 U.S. 356, 363 (2006) (suggesting that *dicta* that was fully debated is binding). This Court has followed judicial *dicta* when it is a "well-established rationale upon which the Court based the results of its earlier decisions." *Seminole Tribe*, 517 U.S. at 67. Moreover, the "principle of stare decisis directs us to adhere not only to the holdings of . . . prior cases, but also to . . explications of the governing rules of law." *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring and dissenting); *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 490 (1986) ("Although technically *dicta*, . . an important part of the Court's rationale for the result that it reache[s] . . . is entitled to greater weight") (O'Connor, J., concurring).

In fact, even if Congress had not endorsed this Court's prior constructions of the FHA so strongly, the Court's statements—whether *dicta* or not—have "'special force,'" for "'Congress remains free to alter what we have done.'" *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008) (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-173 (1989)). Congress's intent controls. However, ill-advised anyone might view their actions, this Court has said that it may not "limit a cause of action that Congress has created merely because 'prudence' dictates." *Lexmark Int'l, Inc.*, 134 S. Ct. at 1388.

Part of the Bank's argument is about prudence. It suggests that the FHA requirement that the

Attorney General prosecute a civil action on behalf of a private aggrieved person litigant's behalf demonstrates that the zone of interests must be narrower. WF Br. 18 (citing 42 U.S.C. §§ 3610(a), (g), 3612(a), (o)). However, no private claimant can insist on having the Attorney General bring a case. Before that happens, the HUD Secretary must find reasonable cause and authorize the lawsuit. *See* 42 U.S.C. § 3612(o). As a practical matter, the authority has rarely been exercised. Notably, lawsuits similar to Miami's brought by Baltimore and Memphis were settled as part of a case brought against Wells Fargo by the Justice Department, which alleged that the Bank had discriminated against 34,000 African-American and Hispanic borrowers during a six-year period through 2009." John L. Ropiequet, *A Curious Dichotomy: Fair Lending Litigation and Enforcement Actions Following Wal-Mart Stores, Inc. v. Dukes*, Banking & Fin. Services Pol'y Rep., at 1 (Jan. 2013).

The Bank also raises the *Thompson* hypothetical about a shareholder who sues because the company has terminated a valuable employee, which causes the stock price to plunge. WF Br. 30. The comparison to the City's position fails, however. The City has a palpable interest, for which it expends resources, to achieve fair housing. *See* J.A. 362-63. It is not comparable to an absentee shareholder.

2. Thompson's approach to "aggrieved person" would not oust Miami from court.

Thompson reaffirmed *Trafficante*'s approach to FHA standing by rejecting an "artificially narrow"

reading of "aggrieved" that would have limited plaintiffs to direct victims of discrimination, the same approach advocated here by the Bank. *Thompson*, 652 U.S. at 177. It held that such an approach "contradicts the very holding of *Trafficante*, which was that residents of an apartment complex were 'person[s] aggrieved' by discrimination against prospective tenants." *Id.*

Instead of adopting a view that only direct victims of discrimination ought to have standing, *Thompson* held that the term 'aggrieved' in Title VII covers "any plaintiff with an interest 'arguably [sought] to be protected by the statute,'" *id.* at 178 (quoting *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 495 (1998) (internal quotation marks omitted)). The only plaintiffs excluded under that approach were those "whose interests are unrelated to the statutory prohibitions in Title VII." *Id.* That limitation is consistent with that of the court below and adopts the same distinction that the Eleventh Circuit utilized in differentiating its holding in *Nasser*, 671 F.2d 432 (holding a developer challenging rezoning was outside the FHA's zone of interest because the lawsuit had no fair housing purpose) from its decision in *Baytree of Inverrary Realty Partners v. City of Lauderhill*, 873 F.2d 1407 (11th Cir. 1989) (holding developer challenging rezoning was within the FHA's zone of interest because the lawsuit asserted the rezoning was the product of racial animus). *See* Pet. App. 46a-47a.

If Congress intended to limit plaintiffs to objects of discrimination, the *Thompson* Court said, "it

would more naturally have said 'person claiming to have been discriminated against' rather than 'person claiming to be aggrieved.'" 562 U.S. at 177.

The Bank further denies that the City's injuries can be linked to Wells Fargo's allegedly discriminatory conduct. In doing so, Wells Fargo does not refute the allegations, supported by expert regression analysis, that provides the linkage, or the logic that countless studies support. *See* J.A. 301-12, 322-26. Instead, it comes up with a remarkable hypothetical. It speculates that "[i]f the same homes had been subject to foreclosure but their owners had *not* suffered any discrimination, the City would have faced the same alleged reduction in revenues and increase in spending." W.F. Br. 28 (emphasis in original). From that hypothetical, the Bank then concludes "the City has pleaded no injury to an interest in non-discrimination." *Id.*

The logic behind this argument escapes the City's grasp. Under this reasoning, one could say that if, in *Trafficante*, a minority seeking an apartment was turned away, not because of his or her minority status, but because of bad credit, the tenant-plaintiffs would still have the same injury—harm to their interests in the benefits of an integrated society. Therefore, on the basis of the Bank's logic, the actual *Trafficante* plaintiffs, suing after a prospective tenant was turned away for a discriminatory reason, also could not plead an injury to an interest in non-discrimination.

The Bank then doubles down on this misguided hypothetical. It suggests that if it had issued

predatory loans to everyone, the City's injury would be worse, but no discriminatory component would exist. WF Br. 29-30. It then says that the fact that the City's injuries then would have been worse due to even more foreclosures "proves that the City lacks an interest in non-discrimination itself." *Id.* at 30. Their conclusion, however, does not follow from their hypothetical. If you remove the discriminatory element from any legitimate FHA case, there is no viable FHA action. Nevertheless, that does not mean that cases *with* the discriminatory element no longer have an interest in non-discrimination.

The best example of the failure of the Bank's hypothetical comes from two cases the Eleventh Circuit contrasted in the decision below. In *Nasser*, 671 F.2d 432, the Eleventh Circuit held a private developer did not have standing to challenge a rezoning plan under the FHA because there was no "allegation of interference with the plaintiff's rights or that [the plaintiff had] aided or encouraged any other person in the exercise or enjoyment of any right protected by the Act." *Id.* at 438.

On the other hand, another private developer mounting a different challenge to a different rezoning plan under the FHA was accorded standing because the developer alleged that the zoning decision was racially motivated and rendered the property worthless. *See Baytree*, 873 F.2d at 1408. The fact that one fact pattern did not have an element of discrimination and the other did, even though both suffered the same ultimate injury, did not oust both. It only ousted the one that could not claim the injury derived from stating a claim under the FHA.

Reviewing the differences between its decisions in *Nasser* and *Baytree*, the Eleventh Circuit in this case held that, "[l]ike Baytree, the City claims to have suffered an economic injury resulting from a racially discriminatory housing policy." Pet. App. 47a. The City urges this Court to adopt the same approach, distinguishing cases that do not allege any element of discrimination from those, like this one, that have ample allegations of discriminatory conduct.

D. The proffered First Amended Complaint was far more than a sprinkling of conclusory statements unrelated to the City's injuries.

The Bank argues that the City's proffered First Amended Complaint (J.A. 350), describing the City's cognizable interests "in promoting fair housing and securing the benefits of an integrated community" and the fair housing efforts of its Department of Community and Economic Development fails to suggest that the City's interests plausibly were actually affected. WF Br. 33. It says there is no explanation of how discriminatory lending frustrates that interest. *Id.* Such a statement can only mean that the Bank has turned a blind eye to the other, detailed allegations of the pleading.

For example, the proposed complaint states that Miami has "an active and longstanding interest in the quality of life and the professional opportunities that attend an integrated community," which it attempts to achieve

> through its Department of Community and Economic Development, which is

> charged with responsibility for operating the City's fair housing program, reducing illegal housing discrimination, monitoring and investigating fair housing complaints, supporting fair housing litigation, and conducting research and studies to identify and address fair housing impediments as a means of improving the overall quality of life in the city.

J.A. 362-63.

It requires no leap of faith to understand that instances of housing discrimination as widespread as Miami has alleged will frustrate the Department's efforts and deplete its resources. There is no difference between Miami's claim and the non-profit organization in *Havens*, a plaintiff that Wells Fargo concedes has standing to pursue an FHA action.

The Bank then asserts that the City failed to show how discriminatory lending that is concentrated in minority neighborhoods denies anyone the benefits of an integrated community, because the "City never explains how Wells Fargo's lending threatened to change the racial composition of Miami or any of its neighborhoods." WF Br. 34. Two responses seem in order. First, in making the argument, the Bank seems to suggest that the FHA provides no remedy to discrimination when the biased act occurs in a homogenous community. Thus, under that formulation, an overwhelmingly minority community can never be the subject of discriminatory lending. Yet, every individual in that community

unquestionably still has an FHA cause of action for housing discrimination.

Second, consider a well-maintained minority neighborhood that falls into disrepair, blight, crime and impoverishment because of a concentration of foreclosed homes resulting from predatory lending. Such a neighborhood will now no longer attract non-minority residents to create a more integrated community—and the newly undesirable conditions will cause the flight of those who already reside in the neighborhood.

In the end, it would be a remarkable concept to create a barrier to standing for cities to enforce one of the nation's most important anti-discrimination statutes. The FHA explicitly recognizes that both private parties and government have authority to enforce its mandates through lawsuits and standing is afforded "within constitutional limitations" to direct and indirect victims of housing discrimination. Here, the City is both a governmental entity and a private enforcer of the Act. The effect that the scourge of housing discrimination causes upon it is undeniable and helped call the FHA into being. Governmental units have "statutory duties, responsibilities, and interests" "broader than the discrete interests of any particular private party," and acts more than as "a proxy for the victims of discrimination." *Gen. Tel. Co. of the Nw., Inc. v. EEOC*, 446 U.S. 318, 326 (1980). Here, the City's interest and the harms visited upon it by discrimination provide the requisite standing.

II. The City Has Sufficiently Pleaded Proximate Cause.

Miami pleaded a chain of causation that sufficiently establishes that the Bank's conduct in issuing undesirable mortgages to minority borrowers was the proximate cause of the City's injuries. Even if FHA proximate cause has a directness requirement, the City satisfies that benchmark because the Bank's misconduct in issuing discriminatory loans had a direct effect on the City's efforts to assure fair housing. J.A. 266-67. 334, 350-51, 362-63, 416-17

In *Inclusive Communities*, this Court required a plaintiff seeking to "make out a prima facie case of disparate impact" "to allege facts at the pleading stage *or* produce statistical evidence demonstrating a causal connection." 135 S. Ct. at 2523 (emphasis added) . There is no heightened pleading standard in discrimination cases. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002). In fact, "[o]rdinary pleading rules are not meant to impose a great burden on a plaintiff, but [instead] provide a defendant with some indication of the loss and the causal connection that the plaintiff has in mind." *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 337 (2005).

Miami met the *Inclusive Communities* standard. The City pleaded a prima facie case of disparate-impact FHA liability through statistical disparities in the treatment of minority and white borrowers tied to a policy that caused the disparity, J.A. 357-58, 381, 389, 392. Additionally, Miami presented statements from former Bank employees, establishing that the Bank intentionally

discriminated against minority borrowers. *Id.* at 395-98.

The City alleged that a regression analysis of available data in Miami reported by the Bank demonstrated that African-American borrowers were 4.321 times more likely to receive a discriminatory loan than a white borrower with similar underwriting and borrower characteristics. Latino borrowers were 1.576 more likely to receive such loans. These disparities existed even among borrowers with FICO credit scores above 660. An African-American borrower with a FICO score greater than 660 was 2.572 times more likely to receive a discriminatory loan than a white borrower with similar underwriting and borrower characteristics, and a Latino borrower with a FICO score above 660 was 1.875 times more likely to receive such a loan. *Id.* at 323-24.

The Complaint also alleged facts that these loan practices foreseeably resulted in foreclosures, did so more rapidly for African-American and Latino borrowers than whites, and that the foreclosures were caused by the discriminatorily unfavorable loan terms. For example, a discriminatory loan in Miami was 5.494 times more likely to result in foreclosure than a non-discriminatory loan. *Id.* at 333. Additionally, a discriminatory loan to an African-American borrower in Miami was 13.324 times more likely to result in foreclosure than a non-discriminatory loan to a white borrower with similar risk characteristics, and a discriminatory loan to a Latino borrower was 17.341 times more likely to result in foreclosure than a loan in a predominantly non-discriminatory loan to a white borrower with similar risk characteristics. *Id.* Moreover, the

Complaint alleged that a loan made to a borrower residing in a predominantly minority neighborhood in Miami was 6.975 times more likely to result in foreclosure than a loan in a non-minority neighborhood. *Id.* at 272.

Miami's Complaint relied upon a rigorous and well-accepted method of multivariate statistical regressions to analyze the pattern of discrimination and its impact on the City. *Id.* at 323-24, 333. *Cf.*, *e.g.*, *ATA Airlines, Inc. v. Fed. Express Corp.*, 665 F.3d 882, 889-90 (7th Cir. 2011) (Posner, Easterbrook, Wood, JJ.) (discussing the difference between proper and improper statistical regressions). It therefore made out a more than plausible case of proximate cause.

This Court's approval of similar municipal claims in *Gladstone*, confirms the legitimacy of the City's causal theory. Moreover, *Havens*' holding that both direct and indirect harms are within the contemplation of the FHA's prohibitions controls the applicable proximate cause analysis and supports Miami's claims. *See* 455 U.S. at 375.

A. Miami adequately pleaded a causal chain that satisfies proximate cause.

Miami's allegations of proximate cause are sufficient because the injury to Miami was the direct, foreseeable result of the Banks' conduct. An FHA action is, "in effect, a tort action" and, as a general matter, tort principles derived from the common law control. *Meyer v. Holley*, 537 U.S. 280, 285 (2003) ("when Congress creates a tort action, it legislates against a legal background of ordinary tort-related liability rules and consequently intends its

legislation to incorporate those rules"). Pursuant to these principles, proximate-cause analysis "normally eliminates the bizarre," *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 536 (1995), and the connection cannot be "so attenuated that the consequence is more aptly described as mere fortuity." *Paroline v. United States*, 134 S. Ct. 1710, 1719 (2014) (citing *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 838-39 (1996)). The proximate-cause analysis excludes only those "link[s] that [are] too remote, purely contingent, or indirect." *Hemi Group, LLC v. City of N.Y., N.Y.*, 559 U.S. 1, 9 (2010).

Miami's allegations are neither bizarre, nor the product of mere fortuity or unforeseen contingency, but were readily foreseeable to the Bank. Indeed, given the close and well-recognized connection between discriminatory actions and the harms alleged by the City, it may be fairly said that the "injury alleged is so integral an aspect of the [violation] alleged [that] there can be no question" that proximate cause is present. *Blue Shield of Va. v. McCready*, 457 U.S. 465, 479 (1982).

This Court's decision in *Gladstone* confirms the sufficiency of Miami's allegations that the bank's conduct was the proximate cause of the injuries alleged. In *Gladstone*, this Court ruled that the same chain of causation alleged here was sufficient. The Village of Bellwood had sued, alleging that discriminatory real estate practices caused a downward deflection of housing prices and a concomitant diminution of Bellwood's tax base, "thus threatening its ability to bear the costs of local

government and to provide services."[7] 441 U.S. at 110, 111. The chain of causation alleged for Bellwood is precisely the chain alleged here.

This Court enhanced *Gladstone*'s holding in its controlling analysis in *Havens*. In *Havens*, this Court contrasted the standing of "testers," those who do not actually seek housing but test to see if discrimination is occurring, with "'neighborhood' standing," based on deprivation of the benefits of living in an integrated community. 455 U.S. at 375. Testers' injuries are direct, this Court held, but an injury derived from neighborhood standing "is an indirect one." *Id.* The "distinction is, however, of little significance" in the context of the FHA, and the "injury alleged thus clearly resembles that which we found palpable in Bellwood," where the harm caused deprived the municipality of "'the social and professional benefits of living in an integrated society' and had caused them 'economic injury.'" *Id.* at 375-76 (quoting *Gladstone*, 441 U.S. at 115 & n.30).

Even to the extent *Gladstone* and *Havens* do not control, Miami's allegations are sufficient under this Court's proximate-cause jurisprudence. That analysis involves the degree of connection required

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[7] Even as it held that the allegations were sufficient, this Court recognized that Bellwood's complaint was "more conclusory and abbreviated than good pleading would suggest," *Gladstone*, 441 U.S. at 110, even under the pre-*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), criteria. By contrast, Miami's Complaint spanned 56 pages and provided enormous detail about the connections between the Bank's misconduct and the harm flowing to the City.

between the harm and prohibited conduct and is statute-specific.[8] *Lexmark*, 134 S. Ct. at 1390.

Recently, this Court explained that proximate cause is "often explicated in terms of foreseeability," *Paroline*, 134 S. Ct. at 1719, as the Eleventh Circuit did below. Pet. App. 38a. *See also Milwaukee & St. Paul Ry. Co. v. Kellogg*, 94 U.S. 469, 475 (1876) (to satisfy proximate cause, an injury must be the "natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances"); *Blue Shield*, 457 U.S. at 479. All that is required is that the alleged cause be "one with a sufficient connection to the result." *Paroline*, 134 S. Ct. at 1719. Even a dissenting opinion upon which the Bank heavily relies acknowledges that an "intervening third-party act, even if criminal, does not cut a causal chain where the intervening act is foreseeable and the defendant's conduct increases the risk of its occurrence." *Hemi Grp.*, 559 U.S. at 25 (Breyer, J., dissenting). Moreover, as Justice Breyer explained the "concept of directness in tort law [is used to] expand liability (for direct consequences) beyond what was foreseeable, not to eliminate liability for what was foreseeable." *Id.*

Nonetheless the Bank resists foreseeability, insisting that it be accompanied by directness. WF Br.

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[8] For example, the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.*, utilizes a relaxed proximate cause standard, in recognition of the importance the statute places on the safety of railroad workers. *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 692 (2011).

40 (citing *Paroline*, 134 S. Ct. 1722). *Paroline* does not require the two go hand in hand, but merely observed that both were present in that case.

Rather than the Bank's treatment of directness as requiring "first step" connection, a proximate cause need only be "substantial enough and close enough to the harm to be recognized by law, [and] a given proximate cause need not be, and frequently is not, the exclusive proximate cause of harm." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 704 (2004). *See also* W. Page Keeton *et al.*, *Prosser and Keeton on the Law of Torts* § 41, at 268 (5th ed. 1984) ("If the defendant's conduct was a *substantial factor* in causing the plaintiff's injury, it follows that he will not be absolved from liability merely because other causes have contributed to the result, since such causes, innumerable, are always present." (emphasis added)).

In any event, foreseeability is not an exercise in consequences as far as the mind can imagine. It operates within the zone of interests the statute establishes and is individual to each statute. Where, as here, the statute constitutes a "broad legislative plan to eliminate all traces of discrimination within the housing field," *Marr v. Rife*, 503 F.2d 735, 740 (6th Cir. 1974), and its language "is broad and inclusive," *Trafficante*, 409 U.S. at 209, foreseeability is cabined in its reach by the purposes served by the legislation. Because the FHA protects both direct and indirect injuries, *Havens*, 455 U.S. at 375, the statute is unlike those "'intended to protect only a particular class of persons or to guard only against a particular risk or type of harm'" for which foreseeability alone is inappropriate. Keeton, *supra*, § 43.

The flower shop that loses a customer as a result of discriminatory loans that blighted a neighborhood, WF Br. 41, is not comparable to Miami. A store cannot claim the same interest in promoting and vindicating fair housing that is true of a U.S. city. It was urban decay and unrest that the FHA was designed to address. *See supra* pp. 13-15. Unlike a local store, Miami stands in similar shoes to a non-profit who assists in equal access to housing and expended resources to identify and counteract discriminatory housing practices. The Bank does not dispute the standing that non-profit, or the proximate cause behind its economic injuries. *See* WF Br. 45. Cities, too, should not be barred from undertaking such a lawsuit as well.

Banks face no undue burden from application of a foreseeability inquiry for proximate cause that is informed by the statutory zone of interest of the FHA. There was no mystery to the harm discriminatory lending practices had on the Miami community. The sheer magnitude of the banks' mortgage operations suggests they had actual knowledge of the well-being of the mortgages they financed. In 2015 alone, Wells Fargo originated $213.2 billion in residential mortgage loans. *Wells Fargo Annual Report* 30 (2015) (WF Report), *available at* https://www08.wellsfargomedia.com/assets/pdf/about/investor-relations/annual-reports/2015-annual-report.pdf.

A multi-billion-dollar business with extensive regulatory and reporting obligations and sophisticated risk management mechanisms cannot be unaware that a large number of loans to specific

categories of borrowers in specific cities will generate and actually have generated foreclosures or the natural consequences of those foreclosures. This is particularly true in Florida because at the time Miami filed its complaint in 2013, the State had the country's highest foreclosure rate and Miami had the highest foreclosure rate among the 20 largest metropolitan statistical areas in the country. J.A. 268.

Indeed, a cursory review of the banks' detailed public statements as reflected in recent Annual Reports provides an extensive discussion concerning the scope and extent of the banks' underwriting, risk management, compliance, and internal audit functions, confirming that they possessed actual knowledge of the consequences of their lending practices.[9] For example, Wells Fargo recites in exhaustive detail practices and procedures regarding risk management, which in turn, describe its risk culture, incorporating "three lines of defense" and an extensive list of internal responsible parties overseeing that risk. WF Report 58-62.

Wells Fargo further describes its procedures pertaining to credit risk management, including residential mortgage loans. It explains that it uses extensive "risk measurement and modeling," as well as a "continual loan review and audit process" to adhere "to a well-controlled underwriting process." *Id.*

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[9] The City has gleaned this information from publicly available statements of the banks. It is not difficult to imagine how additional information would be available through discovery to establish the banks possessed actual knowledge of the consequences of their lending practices.

at 63. It also "employ[s] various credit risk management and monitoring activities to mitigate risks associated with multiple risk factors affecting loans we hold, could acquire, or originate." *Id.* The Bank's credit monitoring for residential mortgage loans includes consideration of factors such as FICO scores, delinquencies, loan to value and combined loan to value ratios. *Id.* at 69.[10]

As the Eleventh Circuit recognized, the banks employ sophisticated analytic tools to perform consumer credit risk analysis.[11] Pet. App. 55a.

While a particular borrower might experience a random, unexpected set of circumstances that might somehow escape the Banks' comprehensive risk management practices and procedures, randomness cannot explain the volume of 990 discriminatory loans issued by Wells Fargo and another 3,325 by Bank of America preliminarily identified in Miami's

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[10] Substantially similar discussions concerning risk management can be found in prior annual reports. *See, e.g.*, *Wells Fargo Annual Report* (2014), *available at* https://www08.wellsfargomedia.com/assets/pdf/about/investor-relations/annual-reports/2014-annual-report.pdf, and the *Wells Fargo Annual Report* (2013), *available at* https://www08.wellsfargomedia.com/assets/pdf/about/investor-relations/annual-reports/2013-annual-report.pdf.

[11] Wells Fargo asserts that its sophisticated analytical tools, capable of anticipating which loans are likely to fail and result in foreclosures "is beside the point." WF Br. 49 n.9. It isn't. This case is at the pleading stage, and the existence of those tools makes the foreseeability of those consequences plausible, just as the wealth of studies showing what happens to cities when discriminatory lending results in a wave of foreclosures supports the plausibility of the causal chain. *See* J.A. 322-23, 337.

Complaint. J.A. 95, 341. Miami alleged that its use of Hedonic regression analysis enabled it to eliminate those that were not the product of improper and discriminatory considerations. *Id.* at 336.

Armed with actual knowledge that their lending conduct resulted in foreclosures, it requires no giant leap to conclude the Banks were well-aware of the harm such conduct inflicted upon municipalities. To begin with, any large residential mortgage lender recognizes that a foreclosed property is located within a community that has the obligation to alleviate the resulting blight to preserve the health, welfare, and safety of its residents. Furthermore, banks routinely conduct appraisals during the lending process, and therefore, readily understand the relationship between foreclosures and property values, and, consequently, the reduction in property taxes resulting from a lowered property values.

Moreover, the Banks were certainly aware of the seminal report published in 2005 by William Apgar and Mark Duda of the Joint Center for Housing Studies at Harvard that exhaustively documented the connection between foreclosures and the resulting injuries suffered by communities.[12] *See id.* at 301-02.

Additionally, the linkage between foreclosures and municipal injuries was extensively documented by the United States Conference of Mayors. *See*

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[12] W. Apgar, M. Duda & R. Gorey, *The Municipal Costs of Foreclosures: A Chicago Case Study* (2005), *available at* http://www.995hope.net/content/pdf/Apgar_Duda_Study_Full_Version.pdf.

Combating Problems of Vacant and Abandoned Properties (June 2006), *available at* http://usmayors.org/bestpractices/vacantproperties06.pdf, *Vacant and Abandoned Properties Survey and Best Practices* (2008), *available at* http://www.usmayors.org/bestpractices/vacantproperties08.pdf, and *Impact of the Mortgage Foreclosure Crisis on Vacant and Abandoned Properties in Cities—a 77 City Survey* (June 2010), *available at* https://usmayors.org/publications/2010%20VAP%20Report.pdf. Thus, extensive, publicly available studies document the connection articulated by this Court in *Gladstone* between discriminatory lending practices and their impact on cities within the sector of the Nation's economy that the FHA addresses.

B. Miami's allegations suffice to establish proximate cause, if proven.

Lexmark made clear a plaintiff is not required to *prove* proximate causation to defeat a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6): "If a plaintiff's allegations, taken as true, are . . . sufficient [to establish proximate causation], then the plaintiff is entitled to an opportunity to prove them." *Lexmark*, 134 S. Ct. at 1391 n.6. After all, causation is an intensely factual question that should typically be resolved by the fact-finder. *Sofec*, 517 U.S. at 401-41. *See also Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1168 (9th Cir. 2013), *cert. denied sub nom. City of Newport Beach v. Pac. Shores Props., LLC*, 135 S. Ct. 436 (2014).

As the Eleventh Circuit held in reviewing the City's Complaint, "it is clear that the harm the City claims to have suffered has 'a sufficiently close connection to the conduct the statute prohibits.'" Pet. App. 57a (quoting *Lexmark*, 134 S. Ct. at 1390). The Court recognized the difficult evidentiary task the City faced, but found that "[a]t this stage, it is enough to say that the City has adequately pled proximate cause, as required by the FHA." *Id.* at 58a. The City should be allowed to assay its proof.

C. The FHA has no directness requirement.

The Bank argues that the claim is insufficient because it is not based on a "direct" harm. WF Br. 38-46. Yet, in *Havens*, this Court resolved this issue and held that the distinction between direct and indirect harms was "of little significance in deciding" whether an FHA plaintiff had a cause of action. 455 U.S. at 375.

For some laws, it matters whether the injuries are direct or derivative, but "[t]he Fair Housing Act is not among those statutes." *New West, L.P. v. City of Joliet*, 491 F.3d 717, 721 (7th Cir. 2007) (holding indirect, derivative injuries are cognizable and compensable under the FHA). Like Miami here, the Village of Bellwood claimed lost property taxes and other expenses based on discrimination perpetrated against others. *See Gladstone*, 441 U.S. at 109-11. In *Havens*, a non-profit organization advancing fair housing successfully claimed a drain on its resources from impairment of its mission, not direct discrimination. 455 U.S. at 378-79.

In this way, the FHA contrasts with other federal statutes to which the Bank compares it. For example, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, presents natural concerns for directness in proximate-cause analysis because the action depends on the existence of closely connected predicate acts. *See Bald Eagle Area Sch. Dist. v. Keystone Fin., Inc.*, 189 F.3d 321, 330 (3d Cir. 1999). Thus, in the RICO context, this Court held a directness requirement was part of proximate cause because the language of RICO was based on the Clayton and Sherman Acts, which also require a direct relationship, and because it is otherwise difficult to "ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors." *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 269 (1992) (citation omitted).[13] In addition, *Holmes* noted that

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[13] The Bank asserts that similar considerations apply under the FHA because the City's damages could "involve a host of independent actors." WF Br. 47. However, the City anticipated these issues and asserted, directly in its Complaint, that regression analysis, employed by statisticians to eliminate the extent to which other factors played a role in the claims and damages like those of the City and to determine whether race influenced decision making, could sort through these disparate causes. J.A. 336-38. *See also Garcia v. Johanns*, 444 F.3d 625, 635 (D.C. Cir. 2006) (discussing the importance of regression analysis). The analysis can control for a variety of potential influences, while estimating the size and statistical significance of the individual influences. *See* D. James Greiner, *Causal Inference in Civil Rights Litigation*, 122 Harv. L. Rev. 533 (2008). *See also In re: Neurontin Mktg. & Sales Practices Litig.*, 712 F.3d 60, 69 (1st Cir. 2013) ("regression analysis is a widely accepted method of showing causation"); Daniel L. Rubinfeld, "Reference

the statute's treble damages provision provided a special incentive for "directly injured victims . to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely." *Id.* at 269-70. Such an incentive does not exist within the FHA, where directly injured victims are, for the reasons stated below, ill-positioned to vindicate the law.

While *Holmes* found that RICO "should not get [] an expansive reading," *id.* at 266, this Court has consistently interpreted the FHA broadly. *See, e.g., Havens*, 455 U.S. at 372; *Gladstone*, 441 U.S. at 109. That capacious interpretation is a function of the importance Congress placed on the rights the FHA protects. The Bank's RICO cases are, thus, inapposite. The requirements for "proximate cause" under one federal statute aimed at one harmful activity are not the same as under a different statute aimed at an entirely different harmful activity. The question presented requires statutory interpretation, not citation to and reliance on unrelated cases that intone the words "proximate cause."

Guide on Multiple Regression," in Federal Judicial Center, *Reference Manual on Scientific Evidence* 179-227 (2d ed. 2000).

Given that a regression analysis, even one that "includes less than 'all measurable variables' may serve to prove a plaintiff's case," *Bazemore v. Friday*, 478 U.S. 385, 400 (1986), the City's allegations in its pleading were more than enough to provide a sufficiently close causal connection between the FHA violations and the City's injuries and gives rise to a "reasonable inference that [the Bank] is liable for the misconduct alleged," *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), as the Eleventh Circuit held. Pet. App. 55a.

Similarly, in *Lexmark*, this Court held that a Lanham Act lawsuit required an "injury flowing directly from the deception" at issue. Even under this "directness" inquiry, the Court found sufficient proximate cause despite the plaintiff, who was not a consumer or direct competitor of Lexmark, having injuries that were "not direct, but include[d] the intervening link of injury to the remanufacturers." 134 S. Ct. at 1391, 1394. Thus, this Court recognized that the plaintiff's allegations "might not support standing under a strict application of the 'general tendency' not to stretch proximate causation 'beyond the first step.'" *Id.* at 1394 (quoting *Holmes*, 503 U.S. at 271). Even so, it still found sufficient continuity between the injury to the direct victim and the injury to the indirect victim "without the need for any 'speculative . . . proceedings' or 'intricate, uncertain inquiries.'" *Id.* (quoting *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 459-60 (2006)).

While RICO and other federal statutes restrict standing and provide incentives for individual lawsuits, Congress adopted a broad approach to standing in the FDA in support of the idea that eradicating housing discrimination is a priority of the first order. *Trafficante*, 409 U.S. at 212. The Bank cites no case that holds that the *FHA* imposes a requirement that the harm caused proceed in the first step from violations of the act—and *Havens* denies that. Instead, recognizing that lawsuits by individuals, by itself, were insufficient to realize its goals, Congress created an important and broad role for government in vindicating the law. In fact, individual borrowers are ill-equipped to recognize patterns of discrimination that give rise to disparate-

impact claims. They do not know that what may have happened to them happened to others. They do not have the means to undertake the statistical analysis necessary to assert a prima facie claim or resources to engage in such litigation. Governmental entities, such as cities, and organizations dedicated to fair housing, more often do.

D. Even if FHA proximate cause imposes a directness requirement, Miami's complaint satisfied or could satisfy the requirement.

Even if this Court accepts the Bank's invitation to impose a more stringent "proximate cause" requirement on FHA pleadings, Miami's Complaint states a claim because the City's alleged injuries were caused by the Bank's unlawful discriminatory acts and the City has a palpable interest in fair housing that was harmed. It cannot be said that the Bank's misconduct in issuing discriminatory loans did not have a direct effect on the City's efforts to assure fair housing.

Miami is a diverse community with an estimated population of 441,003. U.S. Census Bureau, *State & County Quick Facts: Miami (city), FL* (2015), http://www.census.gov/quickfacts/table/PST045215/1245000,00 (last visited Sept. 25, 2016). The City has an inherent interest in racial diversity and non-discrimination in order to achieve the many benefits of living in an integrated community. This interest is directly harmed by the Bank's discriminatory lending policies. In this way, the City's interest easily exceeds that of the individual white and black residents in a

single apartment complex, who asserted the same interest in an integrated community, claims that this Court permitted to proceed under the FHA in *Trafficante*.

Miami's claim is consistent with this Court's holdings that recognize standing when the impact of the misconduct on "the village's racial composition" adversely affects the municipality's housing market, pricing, and property values, "directly injure[s] a municipality by diminishing its tax base," undermines the village's interest in "'stable, racially integrated housing,'" and begins "to rob [municipality] of its racial balance and stability." *Gladstone*, 441 U.S. at 110-11. If these connections, which did not trouble the *Gladstone* Court, were substantial and sufficient in 1979, then there is no reason to treat them as remote or too attenuated today. The municipal interest approvingly identified for the Village of Bellwood is shared by all municipalities, especially the City of Miami.

Among its efforts that authenticate the City's interests in integrated housing, distinctive from that of a local shop or utility, Miami established a "Department of Community & Economic Development," which has responsibility for operating the City's fair housing program, a program designed to "affirmatively further fair housing objectives of Title VI of the Civil Rights Act of 1964, Title VIII of the Civil Rights Act of 1968, as amended, and other relevant federal, state, and local housing laws." J.A. 233. Through the Department, "the City actively works to reduce illegal housing discrimination" by providing "education and training, monitoring and

investigating fair housing complaints utilizing techniques to support fair housing litigation, and conduct research and studies to identify and address fair housing impediments." *Id.*

In fact, the Department's mission statement declares that it "assists in creating a viable urban community for the most needy persons in our City while reducing poverty, embracing diversity, assisting with economic development, and improving the overall quality of life." City of Miami, Department of Community and Economic Development, *About Us*, *available at* http://www.ci.miami.fl.us/communitydevelopment/pages/about_us/ (last visited Sept. 25, 2016). Plainly, the City has a strong, active, and longstanding interest in the professional, stability, and quality of life benefits of an integrated community.

The connection between the Bank's conduct and the inquiry to Miami's interest in a stable, integrated community, its economic injuries and its request for injunctive relief, is sufficient to satisfy the requirements of proximate cause. The Bank's discriminatory conduct adversely affected those interests directly in a foreseeable way. The City's fair-housing efforts inform the proximate-cause analysis, support the causal connection, and distinguish the City from non-participants in fair housing. They establish that the City suffered its damages while fighting the very "conduct the statute prohibits." *Lexmark*, 134 S. Ct. at 1390-91.

Moreover, logical steps, adequately alleged, connect the Bank's unlawful acts with the full array

of the City's injuries: the City asserts that the Bank issued loans on a discriminatory basis, targeting African-Americans and Latinos for less favorable treatment. That steering of minority homebuyers to costlier loans greatly increased the likelihood of foreclosures, as the Bank's own analytical tools would have shown.

Borrowers charged more for a loan than they qualify for, or deceived into taking a loan they cannot afford, are far more likely to lose their home to foreclosure. And the loans associated with this discriminatory conduct did, in fact, result in a significantly increased rate of foreclosures. Many of those foreclosed homes will fall into disrepair and become vacant, resulting in the loss of property taxes, impairment of the city's fair housing efforts, and imposition of remediation and other costs to the city. Without the Bank's actions, these foreclosures and vacancies would not have occurred. This conclusion is more than plausible, having been adopted by this Court in *Gladstone*, 441 U.S. at 110-11 ("[a] significant reduction in property values directly injures a municipality by diminishing its tax base, thus threatening its ability to bear the costs of local government and to provide services"), and is further supported by authoritative federal investigation. These foreclosures resulting from the Banks' discriminatory lending practices decimated minority neighborhoods in Miami, suppressed the property tax values of both the foreclosed properties and surrounding properties, and impeded the City's interest in stable, integrated communities.

The nationwide scale of the Bank's improper targeting of minority borrowers through predatory loans served as the percussion cap that propelled a host of economic evils that created the recent financial crisis. The federal Financial Crisis Inquiry Commission, appointed pursuant to Public Law No. 111-21, 123 Stat. 1617 (May 20, 2009) (codified as amended at 31 U.S.C. § 3729), concluded that "it was the collapse of the housing bubble—fueled by low interest rates, easy and available credit, scant regulation, and toxic mortgages—that was the spark that ignited a string of events, which led to a full-blown [financial] crisis in the fall of 2008." *Financial Crisis Inquiry Report* xvi (Jan. 2011) ("FCIR"), *available at* http://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf. The report details a doubling of homes put into foreclosure in 2006-07 within months of taking a loan because "they likely took out mortgages that they never had the capacity or intention to pay," in part because mortgage brokers "were paid 'yield spread premiums' by lenders to put borrowers into higher-cost loans so they would get bigger fees, often never disclosed to borrowers." *Id.* at xxii. Simply put, "[l]enders made loans that they knew borrowers could not afford." *Id.* As a result of these actions, *the Commission found it entirely foreseeable that the crisis would occur*. *Id.* Moreover, Miami alleged that the misconduct continued after that dark period had passed in the form of other loans that were more expensive and riskier and which were disproportionately made to minority borrowers. J.A. 306, 388.

Given the directness of the injury Miami alleges flowing from the Bank's conduct, Miami's

allegations satisfy any directness requirement that could be imposed, because "directness" cannot be denied in the effect of the alleged misconduct on Miami's fair housing efforts.

Precedents make clear that the "fact that FHA plaintiffs' injuries must be proximately caused by the defendant's discriminatory acts does not, of course, mean that defendants are not liable for foreseeable, but indirect, effects of discrimination." *Pac. Shores Props.*, 730 F.3d at 1168 n.32. For example, in *Lexmark*, even though the plaintiff's injuries were not "direct," this Court found sufficient continuity between the injury to the direct victim and the injury to the indirect victim "without the need for any 'speculative . . proceedings' or 'intricate, uncertain inquiries.'" 134 S. Ct. at 1394 (quoting *Anza*, 547 U.S. at 459-60). Thus, the "directness" or "anti-derivative" version of the rule propounded by the Bank was actually rejected by *Lexmark*, as it found that a non-competing manufacturer could show sufficient proximate cause to bring an action based on Lexmark's false advertising to others, not the plaintiff.

Similarly, in *Staub v. Proctor Hospital*, 562 U.S. 411 (2011), this Court found no fatal break in the causal chain when the employment action was ultimately taken by a company official without any discriminatory animus, but that the termination of employment could still be traced back to previous actions taken by someone else with the requisite animus. It was sufficient that the improper motive was a causal factor. *Id.* at 422.

The consequences of such a strict directness requirement of the type imagined by the Bank at the pleading stage could undermine the FHA's commitment to eradicating housing discrimination and would be inconsistent with the disparate-impact regime this Court only recently validated in *Inclusive Communities*.[14] It would undermine the ability of non-profits as in *Havens* and municipalities as in *Gladstone* to vindicate the FHA's promise of tearing down the barriers that divide us in the housing market. That promise must be vindicated by governmental entities, victims of discrimination, and stand-ins for those victims, such as non-profits and developers who demonstrate their own injuries. With a mandate and purpose as broad as it has, and where the individual victims of discrimination can never realize the scope and full consequences of the violations visited upon them, cities must be among those who can connect the dots and call wrongdoers to account.

Gladstone correctly permitted a municipality to sue over lost tax revenue and the expenses it incurred

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[14] The Bank also asserts that Miami must allege its injuries are an "'intended' or "'desired' consequence of [the Bank's] alleged conduct." WF Br. 41 n.7 & 49 (citing *Hemi Grp., LLC*, 559 U.S. at 24 (Breyer, J., dissenting)). The Bank, however, misreads an observation made by Justice Breyer about the facts in that case and attempts to turn it into a requirement of proximate cause, when Justice Breyer indicates that foreseeability should be the touchstone for proximate cause if the statute at issue is to be treated as a creature of the common law. *See* 559 U.S. at 25. Here, the City alleged, J.A. 277, 326, and the Eleventh Circuit recognized, *id.* at 55a-56a, that the Bank was in a particularly advantageous position to understand the consequences of its actions.

to advance fair housing and remediate neighborhoods affected by discriminatory housing practices. To be sure, "Congress has had [more than] 30 years in which it could have corrected our decision in [*Gladstone*] if it disagreed with it, and has not chosen to do so," *Hilton v. S. Carolina Pub. Ry. Comm'n*, 502 U.S. 197, 202 (1991), strongly indicating that there is nothing to correct. The City's injuries are well within the contemplation of proximate cause as applicable to the FHA.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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Respectfully submitted,

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